Spring 2015

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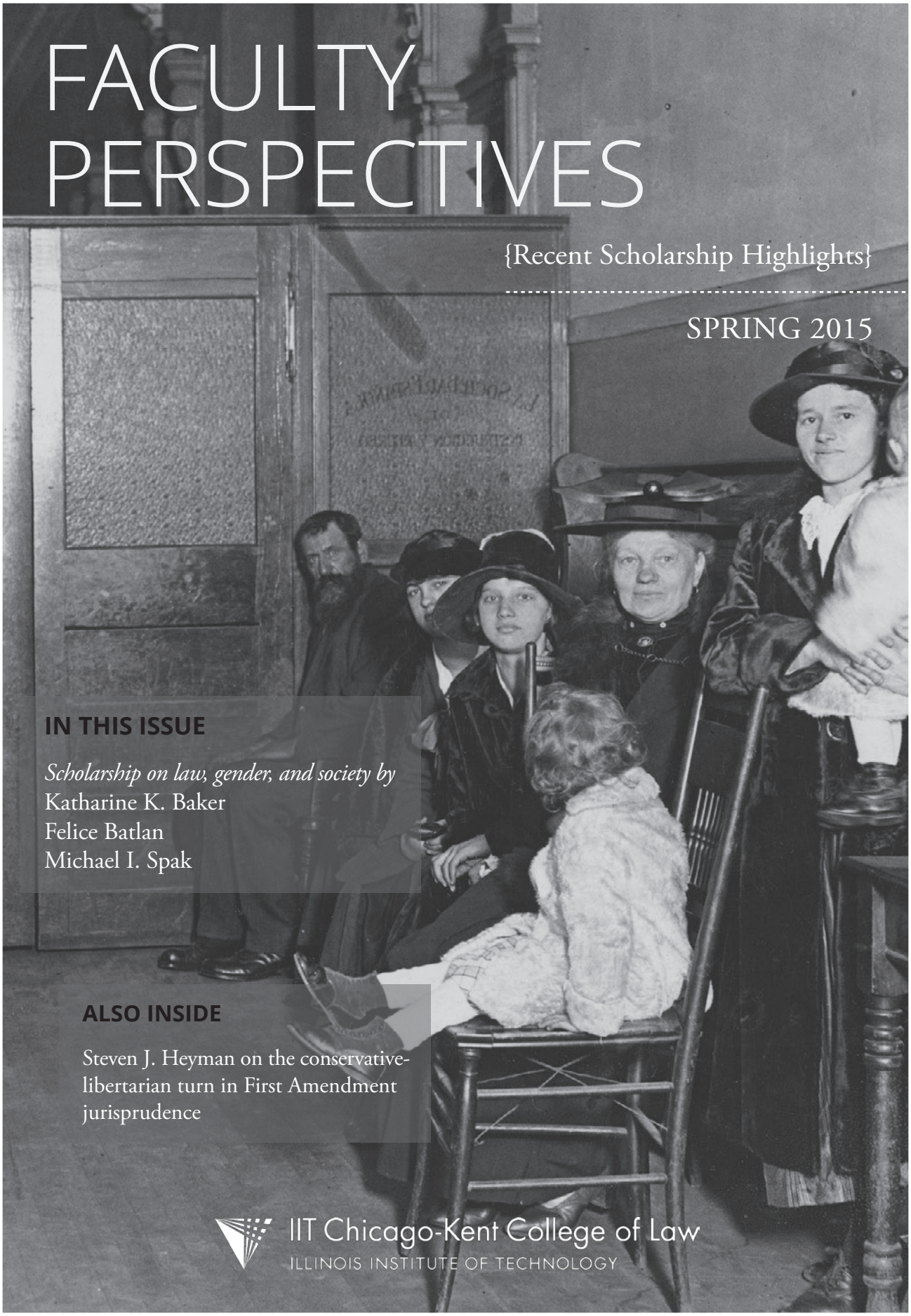

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Featuring scholarship on law, gender, and society

About IIT Chicago-Kent Faculty Perspectives

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Layout and production by Daniel Saunders, IIT Chicago-Kent Faculty Marketing Coordinator

Cover image: Waiting room of the Legal Aid Society of Chicago, c. 1910. Courtesy of the Chicago History Museum.

{Criminology}

WHY RAPE
SHOULD NOT (ALWAYS) BE A CRIME

forthcoming in Minnesota Law Review

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Katharine Baker received her law degree (with honors) from the University of Chicago Law School, where she was a comments editor for the University of Chicago Law Review. After graduating, she clerked for the Honorable Edward R. Becker of the Third Circuit Court of Appeals in Philadelphia. From 1990 to 1993, she was a trial attorney with the Environmental Enforcement Section of the United States Department of Justice.

Most of Professor Baker's work focuses on issues pertaining to women. She has written extensively about sexual violence, in particular about the legal and social understandings of rape and sex. In recent years, she has focused more on family law issues, writing numerous articles on the interrelationships between legal, cultural, and biological constructions of parenthood, marriage, and family.

Professor Baker has taught courses in environmental law, evidence, property, family law, gender, sexual orientation, and domestic violence. From 2001 to 2009, she was Associate Dean for Faculty Development. She has been a visiting professor at the University of Pennsylvania Law School, Yale Law School, and Northwestern Law School.

For more, visit her faculty webpage at www.kentlaw.iit.edu/faculty/kbaker.

WHY RAPE
Should Not (Always) Be a Crime

BY KATHARINE K. BAKER

Shouldn't rape, an act of bodily invasion that can traumatize, endanger, and dehumanize its victims, be punished as crime? For centuries, lawmakers, philosophers, legal theorists and women's rights advocates have converged upon the criminal law as the appropriate vehicle to reflect society's opprobrium and inculcate norms against rape. This may be changing. In response to a broad and comprehensive enforcement effort by the Department of Education (DOE), many universities are re-drafting their campus sexual assault policies so that sexual assault is treated as a form of sex discrimination. Notwithstanding 20 centuries of treating rape as a criminal injury, DOE has recast rape as a civil wrong—a discriminatory act. This article argues that by invoking a civil process, DOE is likely to meet with more success than the criminal law in reducing the amount of nonconsensual sex. Once it does so, the norm of male entitlement that gives rise to so much criminal conduct may be destabilized enough to enable the criminal law as reformed to be enforced.

The story of criminal rape law's undoing begins with the rape reform movement of the 1970s and 1980s, which attempted

A summary of Why Rape Should Not (Always) Be a Crime, ___ *Minnesota Law Review* ___ (forthcoming).

to have the criminal law take rape more seriously. The individual goals of different state rape reform movements were many and tactics varied, but one overriding goal, shared by virtually all reformers, was to expand the amount of criminally proscribed activity. Traditional rape law reflected a social norm that validated men's entitlement to sex and allowed men to consistently ignore and override women's will. By refusing to criminalize sexual activity coerced without force, and often perpetrated by men that women knew, the law sanctioned men's routine appropriation of sex from women. The goal of rape reform was to make women's willingness to have sex—her consent—the centerpiece of the rape inquiry so that men would no longer feel so entitled to disregard a woman's will in their attempt to get as much sex as they wanted. Because the male entitlement norm has not shifted sufficiently, DOE must now use a civil cause of action to combat what had been seen as a criminal problem.

This article advances three overlapping but different reasons for why the criminal law has not been more successful in changing the social norms with regard to male entitlement to sex. First, the criminal burden of proof makes norm transformation exceedingly difficult. Making consent the determinative factor in rape does little good if proving the absence thereof—beyond a reasonable doubt, no less—is all but impossible. A law that defines rape as nonconsensual sex may get the theory of rape right, but it ignores the overwhelming practical difficulty of proving non-consent in a context in which it is perfectly plausible to think that the act was consensual. This problem applies to a huge amount of sexual misconduct, whether secured through force or not.

Victim credibility is crucial in the vast majority of rape cases, but the circumstances in which rapes occur and the sexual nature of the crime make it *likely* that victims will be a bad witnesses. Most acquaintance rapes involve people who have been drinking alcohol; thus their memories are likely to be fuzzy. Even without alcohol, rape victims tend to have fuzzier memories than victims of other types of traumatic or unpleasant experiences. Indeed, blocking out the event from one's memory has been found to be a healthy psychological response. It helps diminish the ongoing trauma that rape victims suffer. In other words, the healthier the victim, the worse she is as a witness.

This problem of having to rely so completely on the victim's credibility has nothing to do with police or prosecutors not believing in the harms of acquaintance. It has little to do with women as a class not being believed. The problem is a crime that by its nature has no witnesses, produces no demonstrable evidence, and inevitably brings with it a perfectly plausible theory of legality, i.e., consent. The crime also involves, indeed the essence of the injury stems from, an act that most people find very difficult to talk about. If no behavior is punished criminally because it cannot be proved, then the public's understanding of criminal behavior will not change.

Second, competing constructions of "the rapist" undermined feminist attempts to de-normalize male predatory behavior. Tough-on-rapist measures enacted in the 1990s reflect an understanding of rapists as profoundly deviant and distinctly criminal. This pathological view of rape rejects the feminist insight at the core of much rape reform, which was that male appropriation of sex is commonplace and completely understandable given heterosexual scripts and norms of sexual pursuit.

Rape reformers knew this. They

knew that they were trying to unpack entrenched norms in gendered scripts that all too easily explained why acquaintance rape was so prevalent. They knew that they were indicting the status quo and trying to make it criminal. But even as these reformers were analyzing the likely problems with making the commonplace criminal, there was a competing, though superficially sympathetic, movement which sought to re-invigorate the notion that rapists—real rapists—were particularly dangerous. The result was a series of tough-on-rapists initiatives—including registration and notification systems for convicted rapists, and both civil commitment rules and special evidence rules allowing prior act evidence in rape trials. In passing these rules Congress relied on demonstrably false stereotypes of rapists as uniquely pathological and distinctly recidivistic.

It is surprising is how little resistance the tough-on-rapist movement encountered from feminists. It took less than 20 years for most state legislatures first to override the traditional approach to rape in order to greatly expand the class of offenses that might be criminalized as sexual assault, and second to institute unique forms of punishment that inevitably restricted the number of men whom the criminal justice system would be willing to classify as rapists. No one commented on the whiplash.

Third, rape reformers failed to appreciate the delicate relationship between rape's injury, victims' agency, and the criminal law. In an effort to combat social norms that divested women of sexual agency, rape reform efforts asked all parties—victim, potential perpetrator, and jurors—to assume women lack agency; but women often resist being viewed this way. Raised to believe they have sexual agency even if research continues to confirm that they do not usually exercise it, young women today would rather see their failure to resist as an affirmative act that resulted in unwanted sex than see his failure to stop as the affirmative act that resulted in rape. Moreover, when rape is a crime against the state, enforcement of it necessarily inhibits a victim's agency because the enforcement power and decision-making is vested in someone other than the victim. While this is true of all personal injury crimes, it is a particular problem with rape law if the essence of the injury is an affront to a victim's autonomy and agency. Enforcing the crime thus tends to accentuate rather than alleviate the injury to agency, and women consistently refuse to label their own experiences as rape, even if the criminal law would seem to.

Women also repeatedly refuse to blame men. Victims are often uncomfortable labeling the men who were negligent, recklessly indifferent with regard to consent, or even a bit forceful as rapists. Champions of the force requirement might use women's reluctance to blame men as proof that rape requires force.

> "The criminal burden of proof makes norm transformation exceedingly difficult. Making consent the determinative factor in rape does little good if proving the absence thereof is all but impossible."

As a theoretical matter, that reasoning is tautological, but as a practical matter, it is irrefutable. Women's reluctance to blame men for rape comes from the lingering cultural confusion over what rape is. If everyone came to view the traditional sexual scripts as pernicious and outdated, like the rule of thumb for domestic violence, it would be much easier to blame men for proceeding without consent. As a practical matter, however, the power to expand the scope of behavior that can be defined as rape is inevitably in the hands of victims. If they believe in male entitlement, they will not be willing to punish the men who are just pursuing that to which they are entitled. DOE is policing predatory behavior, fostered by a norm of sexual entitlement, that disregards women's will.

Resistance to the new policies to date has come mostly from those unwilling to see university procedures as distinct from the criminal law. Thus, critics either insist that the problem be addressed in the criminal system, or they insist that universities provide criminal law safeguards for those accused. But the offense that many men on college campuses are being accused of is not rape. It is discriminatory conduct. If found responsible for such conduct, the men should not be considered rapists. Indeed, because most people are still not ready to call most men who secure sex without consent "rapists," DOE and universities must be careful not to allow people to conflate what DOE is prohibiting with rape. ■

KATHARINE K. BAKER SELECTED PUBLICATIONS

Books

Family Law: The Essentials (Aspen Publishers 2009) (with K. Silbaugh).

Articles

Legitimate Families and Equal Protection, ___ *Boston College Law Review* ___ (forthcoming).

Sex and Equality, 93 *Boston University Law Review Annex* 11 (2013) (symposium).

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A Separate Crime of Reckless Sex, 72 *University of Chicago Law Review* 599 (2005) (with I. Ayres).

{Legal History}

WOMEN & JUSTICE FOR THE POOR
A HISTORY OF LEGAL AID

published by Cambridge University Press

Felice Batlan

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JD, Harvard Law School
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Felice Batlan is both subject and scholar in the field of women's legal history. Her nine years of practical legal experience supplement her rigorous academic career, in which she has published and presented extensively on the topics of legal history, women in the legal profession, and feminist legal theory—occasionally appearing alongside such prominent feminist figures as Gloria Steinem. She is the author of Women and Justice for the Poor: A History of Legal Aid, 1863–1945, just published by Cambridge University Press.

After law school, Professor Batlan clerked for the Honorable Constance Baker Motley of the U.S. District Court for the Southern District of New York and then worked as a law firm associate specializing in securities law and financial markets. She then joined Greenwich NatWest as associate general counsel and head of global compliance. Eventually she returned to the academic world, completing a Ph.D. in U.S. history from New York University.

Professor Batlan has immersed herself in a wide variety of subjects spanning law, financial regulation, and the humanities, serving as both director of the Institute for Compliance and co-director of the Institute for Law and the Humanities. Her teaching areas include U.S. legal history, gender and the law, feminist jurisprudence, corporations, business organizations, securities regulation, and contracts. She has taught courses internationally in Sienna, Paris, Guangzhou, Shanghai, Beijing, and Bangkok. She received Chicago-Kent's Excellence in Teaching Award in 2009 and IIT's Julia Beveridge Award for service to women students in 2008.

Professor Batlan is an associate editor and book review editor for the prestigious Law and History Review. Previously she has performed editorial duties for Continuity and Change, and for the Macmillan-Gale Encyclopedia of the Supreme Court of the United States. As a historian, she has served as both a consultant and a member of the Accession Committee for the U.S. Securities and Exchange Commission Historical Society.

For more, visit her faculty webpage at www.kentlaw.iit.edu/faculty/fbatlan.

WOMEN & JUSTICE
for the Poor: A History of Legal Aid

BY FELICE BATLAN

This book began in New Orleans amid the debris and destruction of Hurricane Katrina. In 2005, when the storm struck, I was living in New Orleans and teaching at Tulane University. The weeks after the storm were a confusing jumble of friends' couches, searches for clothing, and a growing sense that this would not end soon. Doing something in New Orleans seemed better than passively watching the continuing disaster on CNN, so I moved back into my damaged but still standing home. As someone living in New Orleans when much of the city was unoccupied and in ruins, I received constant calls from acquaintances, friends, and friends of friends who were unable to return to the city. People needed help with insurance forms and mortgages, with locating relatives, procuring housing, finding documents, and, above all else, dealing with the Federal Emergency Management Agency (FEMA) and its arbitrary and changing policies and procedures. In the wake of such an enormous catastrophe and the haphazard response by the government, many people needed a witness and advocate on the ground.

FEMA established a series of disaster recovery centers in

A excerpt from *Women and Justice for the Poor: A History of Legal Aid, 1863–1945* (Cambridge University Press 2015).

and around New Orleans that were intended to function as "supermarkets" for hurricane aid. In these centers, victims could apply for FEMA benefits; procure information on repairing a roof; speak to the Army Corps of Engineers; receive a disaster tax rebate; find a Bible, a hot meal, a friendly ear. In theory, the centers were an excellent idea; in practice, they resulted in hundreds of people waiting in long lines for hour after hour. One day I approached a FEMA manager, handed her my resume, and asked if I could set up a legal-information booth. She allowed me to do so without asking a single question. The "booth" consisted of a folding table and my cell phone. I organized a handful of attorney friends, and we staffed our station six days a week for two months.

I noticed that of the thousands of people who stopped by, few needed anything that I understood to be legal advice. A series of complicated emergency rules temporarily allowed volunteer attorneys like myself to practice law. Yet I had no clear understanding of whether I was covered by those rules or for whom I worked. Nor did I have the resources or expertise to practice law in any traditional sense. Instead, I functioned as a sort of mediator, personal advocate, legal educator, and social worker.

People came to our booth because they were desperately frustrated and needed help in whatever form it would come. Often I mediated between FEMA representatives and people applying for benefits, and tried to understand how FEMA was interpreting its ever-changing rules. I informed inexperienced FEMA workers what the agency's policies were on that day, and alerted FEMA employees, all working in the same room, that they were interpreting policy in diametrically opposed ways. Most of all, I listened to people's stories, as the storm produced as many stories as there were survivors. Narrating their stories seemed crucial to those who were trying to process events that had happened so quickly.

"*Women and Justice for the Poor* uncovers the enormous role played by women as legal aid providers and explores how ideologies of gender shaped legal aid."

This work made me reflect on what I was doing and whether I was using my legal knowledge, legal skill, or anything else that I had learned in law school or during my decade as a legal practitioner. In the FEMA center, law and social work bled together. My work seemed similar to that performed by many women's organizations in the late nineteenth and early twentieth centuries. My legal-assistance project made me reflect broadly on volunteer work, charity, lawyers, social workers, and the ambiguities of what the practice of law means in an environment of massive and aching need.

The development of organized free legal aid for the poor in the United States has a rich history that has been overlooked, even buried. *Women and Justice for the Poor* uncovers the enormous role played by women as legal aid provid-

ers in the late nineteenth and early twentieth centuries. It explores how ideologies of gender shaped and constructed what legal aid was and who would be its providers and clients. The book exposes the "real" history of legal aid, a story that the predominantly male leaders in the field of legal aid intentionally masked.

During the late nineteenth century women's organizations pioneered the provision of legal aid in major cities such as New York, Boston, Chicago, and Philadelphia. Although the actual everyday delivery of such aid was carried out primarily by upper- and middle-class women who were not professional lawyers, their work eventually created a female and feminized "dominion" of legal aid. These early organizations specialized in claims on behalf of poor women—first addressing mostly wage claims against employers and then expanding to domestic relations cases and other legal problems. Such organizations defined legal assistance broadly, to include multiple kinds of advice as well as the provision of material aid. They also situated legal assistance within a wider agenda that included equality for women in the workplace, the home, and the public sphere. As practiced by women's organizations, the provision of legal aid intentionally entailed the legal equivalent of a laying on of hands. That is, the connections and interactions between poor women and women lay lawyers, they believed, helped heal class rifts, and they took place in an environment in which poor women could freely tell their stories. With time and experience, women lay lawyers acquired legal knowledge and positioned themselves as experts in the law, a stance that some male lawyers, and judges, accepted and even respected.

Following the creation of women's legal aid organizations, a second generation of legal aid associations developed in the late nineteenth and the early twentieth century. These societies generally were controlled by professional male lawyers,

"The Waiting-Room in the Building of the Workingwoman's Protective Union," illustration by Georgina A. Davis. From Frank Leslie's Illustrated Newspaper*, Feb. 5, 1881. Courtesy of Felice Batlan.*

and they provided legal assistance to both men and women. As a number of male legal aid lawyers gained prominence, they sought to professionalize legal aid and transform it from its status as a charity—with its female dominion of lay lawyers—to something more akin to the private practice of law.

These new legal aid leaders redrew the conventional image of the legal aid client; rather than a poor woman with a domestic relations claim, the client was now a working man with a wage claim. Such manly clients were entitled to legal aid as a means to establish their independence. Many clients of second-generation legal aid societies were immigrants, and attorneys imagined that the provision of legal assistance to these men served as a lesson in citizenship. This process of reconfiguring legal aid obscured women's presence as clients, lay lawyers, and even professional lawyers. Moreover, new legal aid organizations began to reject the types of claims, especially those involving domestic relations, that women typically sought to bring.

By the early 1920s, male leaders in legal aid panicked over issues of gender, authority, expertise, and professionalization. The resulting controversy raised questions about what constituted the practice law, what the rule of law meant, what was a legal problem, what types of services legal aid should provide, and which clients legal aid should serve. Central to these issues was a fundamental question: Was legal aid meant to offer a process-based form of justice by allowing access to an attorney, or was it intended to create substantive justice? Although scholars of legal aid have long pointed to its conservative nature, lay lawyers presented an alternative, more expansive version of legal aid based on ideas of social justice. ■

FELICE BATLAN SELECTED PUBLICATIONS

Articles and Contributions to Books

Legal Aid, Women Lay Lawyers, and the Rewriting of History, 1863–1930, in *Feminist Legal History: Essays on Women and Law* (T. Thomas & T. Boisseau eds., NYU Press 2011).

"If You Become His Second Wife, You Are a Fool": Shifting Paradigms of the Roles, Perceptions, and Working Conditions of Legal Secretaries in Large Law Firms, 52 *Studies in Law, Politics and Society* 169 (2010).

The Birth of Legal Aid: Gender Ideologies, Women, and the Bar in New York City, 1863–1910, 28 *Law and History Review* 931 (2010).

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{Military Justice}

PRACTICAL PROBLEMS WITH MODIFYING THE MILITARY JUSTICE SYSTEM TO BETTER HANDLE SEXUAL ASSAULT CASES

published in Wisconsin Journal of Law, Gender & Society, volume 29

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Professor Spak joined IIT Chicago-Kent as a professor in 1974. He has also taught at DePaul University, St. Louis University, and the University of Maryland. At Chicago-Kent, he teaches courses in the commercial law area.

Professor Spak is the author of numerous books, including Cases and Materials on Military Justice, as well as more than four dozen law review articles. He has been professor-reporter on the Uniform Commercial Code Committee, Illinois Judicial Conference, and other publications. For more, visit his faculty webpage at www.kentlaw.iit.edu/faculty/mspak.

Jonathan P. Tomes is president of Veterans Press, Inc., and EMR Legal, Inc., a nationwide HIPAA consulting firm based in Kansas City, and is a retired lieutenant colonel in the U.S. Army Judge Advocate General's Corps. He was a visiting professor at IIT Chicago-Kent from 1988 to 1994.

PRACTICAL PROBLEMS

with Modifying the Military Justice System to Better Handle Sexual Assault Cases

BY MICHAEL I. SPAK AND JONATHAN P. TOMES

Professor Michael I. Spak and Jonathan P. Tomes have written extensively on the issue of whether the military justice system can properly handle sexual harassment and other sex offenses by servicemembers against other servicemembers, even before the current uproar occasioned by the rise in sexual assaults in recent years and proposed legislation by Senator Kirsten Gillibrand, D-N.Y., which would remove commanders from the decision-making process in such prosecutions. Professor Spak, a retired colonel in the U.S. Army Judge Advocate General's Corps, believes that we should eliminate the entire military justice system, with the exception of relatively minor, purely military offenses. His position is as follows: (1) simply abolish the entire "convening authority" military justice system, with its inherent conflicts of interests, replacing it with whatever civilian jurisdictions would otherwise attach, but (2) keep the military system for minor, purely military offenses. Attorney Jonathan P. Tomes, a retired lieutenant colonel in the U.S. Army Judge Advocate General's Corps and former infantry and military intelligence officer who has served in combat, does not have quite such a radical

A summary of Practical Problems with Modifying the Military Justice System to Better Handle Sexual Assault Cases, 29 *Wisconsin Journal of Law, Gender & Society* 377 (2015).

view, but agrees that problems exist in the system, particularly in the area of sex crimes.

Politicians and military members have been very vocal in espousing their views on this matter, but what is conspicuously absent is a thorough discussion of the necessity for and the practical problems inherent in either turning all prosecutions for sex crimes over to civilian authorities or removing the commander from the decision-making process altogether—as suggested by Senator Gillibrand's legislation, which would remove commanders from the process of deciding whether serious crimes, including sexual misconduct cases, go to trial. Under her proposed legislation, that judgment would rest instead with seasoned trial lawyers who have prosecutorial experience and hold the rank of colonel or above. Her bill also would take away a commander's authority to convene a court-martial. That responsibility would be given to a new and separate office outside the victim's chain of command.

Sounds good, right? Statistics certainly document an increase in military sex crimes recently, but they also document increases in suicides and post-traumatic stress disorder cases likely due to the increased combat rotations of "overseas contingency operations." Nor do we have a good handle on the percentage of civilian sexual assaults that are actually reported, prosecuted, result in convictions, and result in incarceration of the offender. It would not be surprising if the military had a higher conviction and incarceration rate than civilian jurisdictions.

Further, practical problems exist, not all of which favor the servicemember accused of some form of sexual assault. Some courts-martial protections protect the victim. For example, does Military Rule of Evidence 412, the military's version of the Rape-Shield Law, afford more protection than a state's or the federal government's version? And which would prevail in a state court trial?

The potential problems exist in jurisdictional issues, substantive law and procedural issues, rights of accused servicemembers and alleged victims, and practical/economic areas.

"Can the military justice system properly handle sexual harassment and other sex offenses by servicemembers against other servicemembers?"

With regard to jurisdiction, courts-martial have jurisdiction over all violations of the Uniform Code of Military Justice (UCMJ) worldwide and many U.S. civilian crimes as well, by virtue of Article 134, UCMJ, which uses the Assimilative Crimes Act, 18 U.S.C. 13, to make civilian crimes military offenses. What happens if we remove court-martial jurisdiction from military sex crimes? Who has jurisdiction? The jurisdiction of the situs of the crime? Kansas, if the sex crime occurred at Fort Riley, Kansas? Korea, if the crime occurred on Osan Air Force Base? God knows who if the crime occurred in Somalia or a Taliban-controlled area of Afghanistan? Some federal court created to handle such extra-territorial sex crime offenses? Note that many federal laws do not have extra-territorial jurisdiction.

Such a change in court-martial jurisdiction would require re-negotiation of Status of Forces Agreements, which, among others, specify whether the host nation or the visiting nation (in this case, the United States) has jurisdiction over an

offense. Typically, such agreements provide that the host country has exclusive jurisdiction over offenses that violate the host nation's laws, but not those of the visiting nation. The visiting nation has exclusive jurisdiction over offenses that violate its laws but not those of the host nation. It does not, for example, violate Korean law for a U.S. airman to go absent without leave ("AWOL"). Both nations have concurrent jurisdiction when the offense violates the laws of both countries, with the country that the victim is a national of having primary concurrent jurisdiction.

Even within the United States, jurisdictional problems exist. Military bases, like other federal lands, have three types of jurisdiction: exclusive, concurrent, and proprietary use. The latter is where the federal government has no jurisdiction—it all resides in the state in which the base is located. Unless the federal government cedes exclusive jurisdiction over military sex crimes *and the state accepts it*, the state has no jurisdiction. And why would a state want jurisdiction over military sex crimes committed on a military installation?

As to the procedural problems, in such cases, what law applies? Is an Italian court going to apply the UCMJ and its protections for accused servicemembers? Is a French court going to apply the military's definition of sexual harassment? Even though the UCMJ does not provide for jury trials, it does have a military equivalent in a court composed of members. How is this right afforded in a civil law trial presided over by a panel of judges? Will the UCMJ's right to free counsel be eviscerated by a civilian trial? And what is the protection for the victim if the trial is held in Afghanistan and its Sharia law requires four eyewitnesses to convict someone of rape? And is the victim exempt from being stoned to death for adultery if the rapist is acquitted?

With regard to practical and economic problems, amending the jurisdiction of the federal courts by empowering them to prosecute military sexual assaults may be the answer. But amending federal court jurisdiction and the UCMJ may be impossible in this bitterly divided Congress.

Who is going to fund these prosecutions? In one case that one of the authors is familiar with, the travel costs to bring witnesses from all over the world where they had been reassigned was approximately $100,000. Further, the military does not have to pay its expert witness military physicians expert witness fees or fly them first class, but a state or federal court may have to.

What about bail? Military law does not have a right to bail. Rather, the military judge or magistrate determines whether the accused is a flight risk or a threat and whether a lesser form of restraint than pretrial confinement, such as arrest in quarters or restriction to specified limits, would suffice. But a civilian court may grant bail, which would, even despite restrictions—such as no contact with the victim or witnesses—free up the alleged offender to threaten or harm the victim or witnesses or commit other crimes.

Further, military courts-martial have much stricter speedy trial rules than do civilian courts. Are victims going to be pleased with their cases being dragged out for months or years as opposed to the six months or less of the vast majority of courts-martial?

Also, where are convicted military sex offenders going to be confined? The military's prisons, such as the U.S. Disciplinary Barracks (USDB), or federal or state prisons? And who is going to fund civilian prisons, which may already be overcrowded and underfunded? No military prisoners have yet been released from

the USDB, for example, as a result of a judge's order because of overcrowding.

And the foregoing does not even take into account the law of unintended consequences. For example, for all we know, victims will be even less willing to report sex crimes knowing that their case will be dragged through a civilian system.

None of the above discussion is intended to place insurmountable barriers to addressing this problem. But what no one needs, least of all the victims of such crimes, is a knee-jerk reaction that does not thoroughly consider how to address these practical problems and whether civilian courts will actually be a better way to try these cases. ■

MICHAEL I. SPAK SELECTED PUBLICATIONS

Books

Medical Records Retention Guide (Michael Spak, J. Tomes, and R. Dvorak, eds., Veterans Press 5th ed. 2013).

A Survey of Commercial Law (Thomson/West 2006).

Servicemember's Legal Guide: Everything You and Your Family Need to Know About the Law (Stackpole Books 4th ed. 2001) (with J. Tomes & A. Flexer).

Articles

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{Constitutional Theory}

THE CONSERVATIVE-LIBERTARIAN TURN IN FIRST AMENDMENT JURISPRUDENCE

published in West Virginia Law Review, volume 117

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THE CONSERVATIVE-LIBERTARIAN TURN

in First Amendment Jurisprudence

BY STEVEN J. HEYMAN

In recent years, a conservative majority of the Supreme Court has issued a raft of decisions that have cheered the right and dismayed the left. To name only a few cases, *District of Columbia v. Heller* (2008) declared that the Second Amendment guarantees an individual right to own firearms. *Citizens United v. Federal Election Comm'n* (2010) and *McCutcheon v. Federal Election Comm'n* (2014) struck down key limitations on the ability of corporations and wealthy individuals to dominate the political process. And *Burwell v. Hobby Lobby* (2014) held that, under the quasi-constitutional Religious Freedom Restoration Act of 1993, family-owned corporations have a right to religious liberty which permits them to deny contraceptive coverage to their female employees.

Decisions like these clearly align with the political attitudes of the justices. But I believe that these decisions also can be understood to reflect a deeper political and constitutional theory. To see this point, it is important to recognize that the conservative view of the Constitution is not monolithic, but includes two different strands. The first strand is a traditional conservative

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position which supports the government's authority to enforce law and order and to promote traditional moral and social values. This strand can be seen in recent decisions in which the Court has made it more difficult to sue the government and its officials, restricted the rights of criminal defendants, limited the constitutional right to privacy, and lowered the wall of separation between church and state.

In contrast, the second strand of conservative constitutionalism is a libertarian position which emphasizes the need to protect individual freedom against government regulation. This position is rooted in a conception of the person as a separate and independent individual who is entitled to pursue his own aims so long as he does not injure others. Society is an aggregation of individuals, and the state is a necessary evil—an external force that is needed to protect individuals against one another, but which itself poses a serious threat to freedom. The Constitution is designed to protect the negative liberty of individuals against invasion by the government. It is this libertarian strand of conservative thought that accounts for the decisions on gun ownership, campaign spending, and religious liberty that I mentioned above. This strand also underlies other recent decisions that expand protection for property rights, cut back on affirmative action, and impose limits on the welfare state and the power of the federal government—most notably *National Federation of Independent Business v. Sebelius* (2012), in which the five conservative justices ruled that Congress had no power to adopt the Affordable Care Act (ACA) under the Commerce Clause of the Constitution. (The ACA survived only because Chief Justice John G. Roberts, Jr., joined the four liberals in holding that the law could be upheld under Congress's power to tax.)

As *Citizens United* and *McCutcheon* show, this libertarian strand of conservative ideology has also become one of the most powerful currents in contemporary First Amendment jurisprudence. A leading case is *American Booksellers Ass'n v. Hudnut* (7th Cir. 1985), which struck down a feminist anti-pornography ordinance. Judge Frank H. Easterbrook ruled that the state may regulate sexually explicit material to protect traditional morality, but not to promote gender equality—a rationale that he condemned as a form of authoritarian "thought control." Likewise, in *R.A.V. v. City of St. Paul* (1992), Justice Antonin Scalia treated a city's ban on cross-burning as an impermissible effort to impose political correctness by punishing the expression of racist ideas. And in *Boy Scouts of America v. Dale* (2000), Chief Justice William H. Rehnquist ruled that the First Amendment right to freedom of association permitted the Scouts to deny membership to gay persons on moral grounds. In all of these cases—most of which were decided by a vote of five to four—conservative judges have used the First Amendment to protect their conception of individual liberty against laws that sought to promote social values like dignity, equality, and community.

The conservative-libertarian approach has made some valuable contributions to First Amendment jurisprudence. For example, I believe that the conservative justices are right to hold in cases like *Rosenberger v. Rector & Visitors of the University of Virginia* (1995) that public schools and universities may not discriminate against religious speakers, but must grant them the same rights and benefits that they afford to other speakers. The libertarian outlook of the conservative justices also may have helped to prevent a recurrence after 9/11 of the official

suppression of radical speech that marred American law during the Cold War era.

Yet I also believe that the conservative-libertarian approach to the First Amendment has some serious flaws. The first problem is that cases like *Citizens United* and *McCutcheon* draw too close a connection between free speech and property rights, and fail to recognize the ways that unconstrained political spending and contributions can distort and undermine the democratic process. Second, decisions like *Hudnut* and *R.A.V.* extend too much protection to speech that injures, abuses, or degrades other people. Third, the judges whom we are discussing tend to be social conservatives as well as libertarians, and deep problems arise when these two aspects of conservative thought collide with one another, as they have in recent cases involving animal cruelty, violent video games, and Internet pornography. Fourth, by upholding traditional restrictions on expression, such as the obscenity doctrine, while striking down regulations that reflect liberal or progressive values, the conservative-libertarian approach fails to satisfy its own demand for ideological neutrality. And finally, the conservative-libertarian commitment to protecting free speech against the government focuses on individuals within the private sphere and not on those within governmental institutions. As a result, the approach tends to deny protection to those groups who are most vulnerable to state control, such as prisoners, public employees, and those who serve in the military.

The root problem is that the conservative-libertarian approach is based on an overly narrow and one-sided view of the self—a view that stresses the ways in which we are separate and independent individuals, but that fails to adequately recognize the social dimension of human life. We need to develop an approach to the First Amendment that is based on a broader and richer conception of the self, the society, and the nature of constitutional freedom. I call this approach liberal humanism. Like conservative libertarianism, this view stresses the value of liberty. But it understands liberty not merely in negative terms—as freedom from government intrusion or regulation—but also in more positive terms, as the capacity to pursue the full development and realization of the self, through one's own individual activities as well as through social relationships and participation in the community. On this view, there is no inherent conflict between the value of individual liberty and social values such as dignity, equality, and community. Instead, the law should seek to reconcile all of these values with one another.

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Free speech has both an individual and a social dimension: when individuals communicate with one another, they not only are engaging in self-expression but also are participating in a form of social

interaction. It follows that the right to free speech carries with it a duty to respect the personality of others and their status as members of the community. For this reason, I would argue that the law should be allowed to impose reasonable restrictions on speech that injures, abuses, or degrades other people, including some forms of racist hate speech and violent pornography. Similarly, the right to free association should not necessarily empower groups that play a central role in the community, such as the Boy Scouts, to exclude individuals on invidious grounds like sexual orientation. Finally, the liberal-humanist view conceives of political speech as democratic deliberation among free and equal citizens, and thus would support some restrictions on activity that undermines our ability to engage in that process, such as unlimited electoral spending by corporations and wealthy individuals. In this way, we can reconcile First Amendment freedoms with other values that are essential to a liberal democratic society. ■

STEVEN J. HEYMAN SELECTED PUBLICATIONS

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